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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1926.

Number [redacted] iginal 11

STATE OF NEW YORK,
Complainant.

vs.

STATE OF ILLINOIS and THE SANITARY DISTRICT OF CHICAGO,
Defendants.

SUGGESTIONS OF DEFENDANTS IN RESPONSE TO MOTION OF COMPLAINANT FOR ORDER ON DEFENDANTS TO ANSWER.

OSCAR E. CARLSTROM,
Attorney General of Illinois,
CYRUS DIETZ,
HUGH S. JOHNSON,
Solicitors for Illinois,
MACLAY HOYNE,
Attorney for The Sanitary District of Chicago,
GEORGE F. BARRETT,
EDMUND D. ADCOCK,
Solicitors for The Sanitary District of Chicago.

JAMES M. BECK,
JAMES HAMILTON LEWIS,
Of Counsel for The Sanitary District of Chicago.

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And now come the State of Illinois and The Sanitary District of Chicago, the defendants in the above entitled cause, and, in response to the motion of complainant for an order on defendants to answer the bill of complaint herein, move the Court:

First: That the answer heretofore filed by these defendants to the bill of complaint in the related case of the *State of Michigan, Complainant,* v. *The State of Illinois and The Sanitary District of Chicago, Defendants,* now pending in said court as No. 13, original, stand and be treated as and for their answer to the bill of complaint, except Paragraph III thereof, in the above entitled cause and that an order to that effect may be forthwith entered herein; and for grounds of such motion show:

(*a*) That the bill of complaint herein, except as to Paragraph III thereof, is substantially identical with the bill of complaint in the said Michigan case.

(*b*) That on the 7th day of June, 1926, an order was entered in the case of *Wisconsin, et al.*, v. *the State of Illinois, et al.*, No. 7, original, giving leave to the parties in the Michigan case to participate in the taking of evidence and in the hearing before the Special Master in the Wisconsin case, in like manner and with like effect, as if the Michigan suit had been consolidated with the Wisconsin case, and that thereafter the State of Michigan elected to so participate and has, in all such hearings, so participated.

(c) That, since the entry of the order herein of November 23, 1926, giving leave to the complainant herein to also participate in such hearings, the said complainant has so participated and, with respect to the above entitled cause, such hearings have proceeded in the same manner as if the issues had been joined herein with respect to all the allegations of the bill of complaint herein, except Paragraph III thereof, and as if answer had been filed to that part of the said bill of complaint in the form as actually filed to the bill of complaint in the Michigan case.

Second: That these defendants may have leave to file herein, instanter, their motion (herewith presented) to strike said Paragraph III of said bill of complaint, for the reasons in said motion stated.

By Paragraph 7 of its reasons accompanying its said motion, complainant states the real purpose of its motion to be—to compel defendants to answer Paragraph III of its bill of complaint in order that complainant may present evidence thereunder before the Special Master under the pending reference, notwithstanding the taking of testimony before the Special Master has been closed and final arguments, upon the record as now made before the Special Master, have been set to begin May 31, 1927.

Insofar as the said application of the said complainant seeks to inject the issues involved in said Paragraph III into the

said related cases and the hearings of said related cases, before the said Special Master, under the pending reference, these defendants oppose such action for the following reasons:

(*a*) The bills of complaint in the Wisconsin and Michigan cases seek injunction against the diversion, complained of, solely because of an alleged impairment of navigation upon the Great Lakes System of Waterways. There is no question of impairment of, or injury to, water power or water power rights involved in those suits. Therefore, the alleged cause of action, attempted to be stated in Paragraph III of the bill of complaint herein, is not common to all or any of the complainants in the related suits and any such issue is entirely foreign to the issues involved in the hearings in those related cases.

(*b*) The order of the Court of November 23, 1926, granting leave to the complainant herein to participate in the hearings before the said Special Master in the related Wisconsin case, among other things, provides:

> "But this order is made without prejudice to the authority of the Court hereafter to make any order which it may deem proper respecting the matters set forth in the third paragraph of the bill of complaint in the case of the *State of New York* v. *the State of Illinois and Sanitary District of Chicago,* and respecting the issues that may arise from the presence of that paragraph in that bill of complaint."

The defendants opposed the motion of complainant (resulting in said order) to participate upon the ground, among others, that said Paragraph III of the bill of complaint presented an alleged cause of action not common to all or any of the complainants in the two related suits (Wisconsin and Michigan cases).

(*c*) There is no allegation in the bill of complaint that any water power plant or any defined water power project on

the Niagara and St. Lawrence Rivers in the State of New York has been, or will be, injured by the diversion or that the cessation of the diversion would benefit any such projects. There is presented by said Paragraph III only a moot question. Whether there might be water power projects projected in these international waters, after consent of the United States and Canada, is purely speculative, conjectural and hypothetical and upon such a showing no finding or relief could be based.

Defendants should not be required to answer Paragraph III of said bill of complaint and no testimony should be taken upon that issue until there is a determination by this Court that said Paragraph III presents a case or controversy appropriate for the exercise of judicial power. *New Jersey* v. *Sargent,* 269 U. S. 271.

(*d*) During the said hearings the Special Master struck out certain evidence presented by the complainants as to the possible power that might be developed in the Niagara and St. Lawrence Rivers from the water diverted and as to the use that might be made of such power. At page 5434 of the record of such hearings there appears a colloquy between the Special Master and the Hon. Newton D. Baker, one of complainants' counsel, with relation to that subject, as follows:

> "The Special Master. Well, I understand that. But the point is that this relates to a possible hypothetical development in the St. Lawrence-Niagara section, not to any development that has yet been made, or even the subject of any defined project upon which anybody has entered.
>
> Mr. Baker. That is true."

On the same subject the Special Master further said:

> "Do you suppose any court would act upon a purely hypothetical and speculative damage of that kind?" (Rec. 5438.)

* * *

"And New York does not absolutely control the development of power. The United States has to be considered and Canada has to be considered." (Rec. 5442.)

* * *

"This testimony that is now the subject of the motion is testimony with regard to the St. Lawrence-Niagara section. I do not think I should allow that to remain in the record, thus to invite contradiction or evidence upon those points which might take up a great deal of time and which, personally, I should not make the basis of a finding." (Rec. 5444.)

It is apparent on the face of the record that said Paragraph III should now be stricken, without further proceedings.

Respectfully submitted,

OSCAR E. CARLSTROM,
Attorney General of Illinois.

CYRUS DIETZ,
HUGH S. JOHNSON,
Solicitors for Illinois.

MACLAY HOYNE,
Attorney for The Sanitary District of Chicago.

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